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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 746

ROBERT A. TAFT, EXECUTOR OF THE ESTATE OF ANNA S. TAFT, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 19–32) is reported in 33 B. T. A. 671. The opinion of the Circuit Court of Appeals (R. 72–78) is reported in 92 F. (2d) 667.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 2, 1937. (R. 72.) Petition for a writ of certiorari was filed February 1, 1938, and was granted March 7, 1938 (R. 78). The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether amounts payable pursuant to certain promises made by decedent in her lifetime were deductible from her gross estate as claims against the estate incurred bona fide and for an adequate and full consideration in money or money's worth, within the meaning of Section 303 (a) (1) of the Revenue Act of 1926, or as transfers to charitable institutions under Section 303 (a) (3) of that Act.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra*, pp. 39–44.

STATEMENT

The following is a summary of the material facts found by the Board of Tax Appeals:

The decedent died on January 31, 1931 (R. 20).

In May 1930, the decedent made an offer, which the University of Cincinnati immediately accepted, to establish the Charles Phelps Taft Memorial Fund for use in teaching the humanities, to which she expected "ultimately" to transfer $2,000,000, and meanwhile amounts equivalent to the income of such a fund. The trust was formed, and $50,000 was given to it in October 1930, of which $33,800 was appropriated in December 1930, by the trustees

to specific uses by the university, $11,753.83 being actually spent by the university before decedent's death. Thereafter the taxpayer, decedent's executor, paid amounts to the trust fund from time to time roughly equivalent to interest at prevailing rates upon the $2,000,000 (R. 23; see R. 49).

Before her death, decedent had promised to contribute to the Cincinnati Institute of Fine Arts $3,920 each year for two years, to be used to pay the compensation of two musicians in the Symphony Orchestra who would otherwise have been dropped from the orchestra for want of sufficient funds to pay them. She paid the first $3,920 before her death, and the taxpayer, as her executor, paid the second $3,920 after her death (R. 27).

In a letter of June 3, 1929, to the president of the Cincinnati Institute of Fine Arts, the decedent promised to contribute $10,000 per annum toward the salary of a man to be employed by the institute as director of art. Thereupon the institute engaged such a man. Before her death the decedent paid $10,000 which was used for the payment of such salary in 1930, and $5,000 in 1931. After her death the taxpayer, as her executor, paid $5,000 in 1931 as the remainder of what he regarded as the obligation for 1931, and in March, 1932, paid $5,000 more (R. 30–31).

In 1930 the decedent promised the University of Cincinnati to pay $3,000, the amount of his salary, if the university would employ Professor Kelly to

give a course in musical appreciation, a course which the university was not otherwise financially able to support. Kelly was employed and the decedent made five periodic payments of $300 to the university in this amount during her lifetime, and the taxpayer, as her executor, paid $1,500 on this amount after her death (R. 31).

The taxpayer claimed deductions from the gross estate of the foregoing items, under Section 303 of the Revenue Act of 1926, but the Commissioner disallowed them (R. 42). Upon review by the Board of Tax Appeals, the Commissioner's action was sustained as to those items, and the court below affirmed.

SUMMARY OF ARGUMENT

I

The promises made by decedent to charity were legally enforceable against the executor and were the fruit of a generous-spirited philanthropy. But it seems plain enough that the statute does not permit the deduction of their amount from the value of the gross estate.

Claims against the estate may be deducted under Section 303 (a) (1) only when "incurred or contracted bona fide and for an adequate and full consideration in money or money's worth." As these words are ordinarily used, it is plain that they do not embrace a promised gift to charity. Such, too, is the conclusion compelled by the legislative history of the section. The quoted limitation upon de-

duction appeared in the 1924 Act for the first time, when it required that the claims be incurred for "fair" consideration. Apparently in response to a decision that "fair" was not so rigorous a limitation as "adequate" or "full" consideration, the 1926 Act was revised to require that the consideration be "adequate and full." The Treasury Regulations, at least since 1929, have expressly forbidden the deduction of a pledge or subscription made without adequate and full consideration in cash or its equivalent. In the nine years since its promulgation, Congress has four times amended the estate tax and has twice amended the section in question. It must, therefore, be taken to have adopted the interpretation of the Regulations.

The Board of Tax Appeals has consistently ruled that mere promises to make gifts to charities are not deductible claims. Such has been the decision in the Circuit Courts of Appeals for the Second, Sixth, and Eighth Circuits. Only the Court of Appeals for the Third Circuit has decided to the contrary.

That the decedent could have secured tax exemption had she made her gifts outright, or in her will, is immaterial; the Revenue Acts must be applied as they are written.

II

Nor may these promises be deducted from the gross estate under Section 303 (a) (3). That section relates only to "bequests, legacies, devises, or transfers" to a charitable corporation. The term

"transfers" as used in the section relates only to those made in contemplation of death, or intended to take effect at or after death, and which are therefore included in the gross estate. Moreover, the term "transfer" refers to a completed transaction, by which the title or possession to the property has passed. This evident purpose of the section is confirmed by its legislative history, which indicates a congressional desire for a precise correlation with the section which includes the amount of certain *inter vivos* transfers in the gross estate. Ever since 1921, the Regulations have required that the transfer be one made "in the lifetime of the decedent." The repeated re-enactment of the statute indicates congressional approval such that the Regulations have the force of law.

The Circuit Court of Appeals for the Second and Third Circuits have ruled that promises such as these are deductible transfers; in none of the opinions has there been an explanation of the decision, except a patently erroneous impression in the Third Circuit that this Court had approved the ruling in the Second Circuit. The Circuit Courts of Appeals for the Sixth and Eighth Circuits, on the other hand, have held that mere promises to give money are not transfers and can not be deducted. The Circuit Court of Appeals in the Tenth Circuit, in deciding a related question has indicated a similar approach.

Whatever the policy of Congress to encourage gifts to charity, the petitioner can not claim a de-

duction which is plainly not allowed by the statute. At the most, as the court below has said, the decedent promised in the future to make transfers. These promises were not transfers in her lifetime. Indeed, in the case of the gift to the University to endow studies in the humanities, the record does not show that the funds had even yet been transferred to the University.

ARGUMENT

I

THE CLAIMS WERE NOT INCURRED BY THE DECEDENT FOR AN ADEQUATE AND FULL CONSIDERATION IN MONEY OR MONEY'S WORTH WITHIN THE MEANING OF SECTION 303 (A) (1)

The decedent promised varying sums of money to the University of Cincinnati and to the Cincinnati Institute of Fine Arts; the promises were made, respectively, to endow study courses in the humanities and to finance the employment by the promisees of a director of art, two musicians, and a professor of music. The executor seeks to deduct the amount of these promises from the gross estate of the decedent. His first contention is that the promises were "claims against the estate," deductible under Section 303 (a) (1), *infra.*

It should, in *limine,* be noted that the Government does not argue that these promises were not legally enforceable against the executor. Nor, of course, do we wish to be thought unmindful of the

generous-spirited philanthropy which motivated the decedent. But the question is whether the statute permits the executor to deduct the amount of these promises from the gross estate of the decedent. It seems plain enough that no such permission is granted.

1. Section 303 (a) (1) of the Revenue Act of 1926, *infra*, authorizes the deduction from the gross estate of—

> Such amounts for * * * claims against the estate, * * * *to the extent that such claims * * * were incurred or contracted bona fide and for an adequate and full consideration in money or money's worth,* * * * as are allowed by the laws of the jurisdiction * * * under which the estate is being administered. [Italics added.]

Language hardly could be clearer. Congress has unmistakably indicated that the deductible claim must not only be one founded on legally sufficient consideration but also one for which the claimant has given a substantial equivalent, measured in pecuniary terms.[1]

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[1] So plain is this purpose that there is no occasion to explore the nature of the "consideration" which underlies the charitable subscription. The commentators deny that there is any consideration at all, and choose to explain the cases holding the subscriptions enforceable in terms of a promissory estoppel, or of an exception carved out of the general requirement that an enforceable promise have consideration. Williston on Contracts (1936 ed.), I, Sec. 116; Billig, *The Problem of Consideration in Charitable Subscriptions*, 12

Whatever the "consideration" which made the decedent's promises enforceable, whatever the pleasure and satisfaction derived by decedent from her generosity, it cannot be argued that it was "adequate and full * * * in money or money's worth", as those terms are ordinarily used. With words so much a part of common speech as these, neither the lexicographers[2] nor the courts can contribute appreciably to the content of their "plain popular meaning" (*United States* v. *Kirby Lumber Co.*, 284 U. S. 1, 3). But it may be noted that the courts in more or less dissimilar situations have held that "adequate consideration" imports more than legal consideration,[3] or, indeed, that it means the fair monetary equivalent of the thing promised;[4] "adequate and full considera-

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Corn. L. Q. 467; cf. Restatement, Law of Contracts, I, sec. 90. If there were *no* consideration for the decedent's promises, any further inquiry as to its adequacy under the statute would be vain.

[2] Petitioner suggests (Br. 14–15) that the whole clause can be taken to mean "legal consideration" since one definition of "full" is "adequate," and one definition of "adequate" is "legally sufficient." By choosing others of the many definitions offered in Webster, one could more naturally conclude that the clause requires consideration which is perfectly or completely (full) equal or correspondent (adequate) to the money which is promised, and is its full equivalent (money's worth).

[3] *Hays* v. *Patterson*, 97 Kan. 478, 480; *Greenwood* v. *Greenwood*, 96 Kan. 591, 595.

[4] *U. S. Smelting Co.* v. *Utah Power Co.*, 58 Utah 168, 180; *In re Fulton's Estate*, 176 Cal. 663, 668; *Boulenger* v. *Morison*, 88 Cal. App. 664, 669; *Cushing* v. *Levi*, 117 Cal. App. 94.

tion" thus cannot mean less than the full pecuniary value. So, too, "money or money's worth" has been held to mean "cash or its equivalent."[5] And in *Attorney-General* v. *Boden,* L. R. [1912] K. B. 1, 539, 560–565, the court unhesitatingly recognized that the corresponding requirement of the British estate tax, exempting property passing from the decedent under a purchase from him "for full consideration in money or money's worth paid to the vendor" covered only financial or pecuniary consideration.

2. The plain meaning of Section 303 (a) (1) is confirmed by the history of this section. Section 203 (a) (1) of the Revenue Act of 1916, c. 463, 39 Stat. 756, Section 403 (a) (1) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, and Section 403 (a) (1) of the Revenue Act of 1921, c. 136, 42 Stat. 227, each provided for an unqualified deduction of the claims against an estate "allowed by the laws of the jurisdiction" governing administration. Cf. *In re Atkins' Estate,* 30 F. (2d) 761 (C. C. A. 5th). In 1924 the law was amended so as to authorize deduction of claims against the estate only to the extent that they were "incurred or contracted bona fide and for a fair consideration in money or money's worth." See Section 303 (a) (1) of the Revenue Act of 1924, c. 234, 43 Stat. 253. This qualification served sharply to contract the classes of claims which could be deducted from the gross estate.

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[5] *Gillett* v. *Chicago Title & Trust Co.*, 230 Ill. 373, 408; see *Wetherbee* v. *Baker*, 35 N. J. Eq. 501.

However, after passage of the 1924 Act, in *Ferguson* v. *Dickson,* 300 Fed. 961 (C. C. A. 3rd), certiorari denied, 266 U. S. 628, a similarly phrased exception to the contemplation of death provision (Sec. 402 (c) of the 1918 Act) served to exempt from taxation a "sale" made in consideration of the wife's release of her inchoate right of dower. The court contrasted 'fair" consideration with "adequate" consideration, as used in the Act of 1864 (sec. 132, c. 173, 13 Stat. 223, 288), and with "full" consideration, as used in the Massachusetts act (Laws of 1921, c. 65, sec. 3), and concluded that the exception covered any sale which is "honest, reasonable, and free from suspicion" whether or not the consideration is "strictly 'adequate' or 'full' " (p. 964). When the Revenue Acts were next revised, Congress changed the wording of the phrase and permitted the deduction of claims against the estate only when "incurred or contracted bona fide and for *an adequate and full* consideration in money or money's worth." Section 303 (a) (1) of the 1926 Act, *infra.*[6]

The history of the provision thus shows a consistent effort by Congress to narrow the group of deductible claims to those for which the decedent had received an equivalent pecuniary benefit. The final change, amending Section 303 (a) (1) of the 1926 Act, confirms this conclusion. Section 805 of

[6] This change was inserted by the conference committee and no explanation was made. See H. Rpt. No. 356, 69th Cong., 1st Sess., pp. 49–50.

the Revenue Act of 1932 (c. 209, 47 Stat. 169). The amended section limits deductible claims against the estate to the extent that they were incurred or contracted bona fide and for an adequate and full consideration in money or money's worth "when founded on a promise or agreement." This change was made because of a fear that claims based on tort or arising by operation of law could not otherwise be deducted.[7] This change would hardly have been made had the section merely excluded claims which were unenforceable or were not bona fide.

A similar conclusion results if attention turns from the progressive refinement of the limitation to its source. From the 1916 to the 1924 Acts, in taxing transfers made in contemplation of death or intended to take effect at or after death, Congress exempted "a bona fide sale for a fair consideration in money or money's worth."[8] In the Revenue Act

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[7] H. Rpt. No. 708, 72d Cong., 1st Sess., reads (p. 48):

> (4) A clarifying provision limiting the requirement of an adequate and full consideration in money or money's worth to liabilities founded on contract. The existing law might be open to a construction under which no claim against the estate would be deductible unless supported by an "adequate and full consideration in money or money's worth," but the real intent could hardly have been to deny the deduction of liabilities imposed by law or arising out of torts, and the amendment whereby the requirement of a consideration applies only where the liability is founded on contract is designed to clear up any doubt which may be thought to exist.

See, also, S. Rpt. No. 665, 72d Cong., 1st Sess., pp. 50–51.

[8] Revenue Act of 1916, sec. 202 (b), c. 463, 39 Stat. 756; Act of 1918, sec. 402 (c), c. 18, 40 Stat. 1057; Act of

of 1924 the identical language was used to limit the claims which could be deducted from the value of the gross estate because "on principle the same limitation should be applied here." [9]

Had the decedent conveyed property to the charitable corporations in contemplation of death rather than made promises to them, it hardly would be argued that the conveyance was "a bona fide *sale* for an adequate and full consideration in money or money's worth." [10] Since the limitation on deductible claims is intended to have the same scope, it can not be thought to permit the deduction of claims which were incurred for a consideration insufficient under Section 302 (c). *Latty* v. *Commissioner,* 62

1921, sec. 402 (c), c. 136, 42 Stat. 227; Act of 1924, sec. 302 (c), c. 234, 43 Stat. 253.

[9] H. Rpt. No. 179, 68th Cong., 1st Sess., reads (p. 28):

> Section 303:
> In paragraph (1) of subdivision (a) a clause has been inserted, authorizing the deduction of claims, mortgages, and indebtedness of the estate only to the extent that such claims, mortgages, and indebtedness have been incurred or contracted for a fair consideration. Section 402 (c) of the existing law contains a limitation similar in character in the case of transfers and trusts, whereby property interests transferred by the decedent in contemplation of or intended to take effect at or after his death are included in his gross estate, unless such interests were transferred by a bona fide sale for a fair consideration. On principle the same limitation should be applied here, and the proposed amendment is designed to effect this result.

See, also, S. Rpt. No. 398, 68th Cong., 1st Sess., p. 35.

[10] The controversy would be somewhat academic, of course, since Section 303 (a) (3) permits deduction of such transfers from the gross estate.

F. (2d) 952, 954 (C. C. A. 6th); cf. *Helvering* v. *Bullard*, No. 349, this Term.

3. The Treasury Regulations applicable to this question remove it from any doubt. The regulations promulgated under the 1924 Act and the first edition of those under the 1926 Act in this respect merely paraphrased the statutory language. Regulations 68, Arts. 29, 36; Regulations 70 (1926 Ed.), Arts. 29, 36. But the 1929 edition of Regulations 70 makes the application of the statute perfectly clear. Article 36 provides in part:

> A pledge or a subscription evidenced by a promissory note or otherwise, even though enforceable against the estate, is deductible only to the extent such pledge or subscription was made for an adequate and full consideration in cash or its equivalent received therefor by the decedent.

So far as is material to the case in this Court, this language has been retained in all subsequent regulations.[11]

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[11] Regulations 80 (1934 ed.), Art. 36 and Regulations 80 (1937 ed.), Art. 36, insert the requirement that the pledge or subscription be "made *bona fide and* for an adequate and full consideration" and omit the requirement that the consideration be "received therefor by the decedent."

The Commissioner did not seek review of that part of the decision below (R. 77–78) holding deductible pledges contingent on contributions by others or to endow scientific research. Since that question is not before this Court, it is unnecessary to consider the effect of the omission of the last five words in the subsequent regulations.

This provision of the Regulations expressly excludes just such claims for deduction as are made in the case at bar. It has been in effect for nine years. During that time Congress has four times amended the estate tax and has twice amended the very section under which these regulations were promulgated.[12] They have, accordingly, a status closely similar to that of a regulation which has been confirmed by reenactment of the section under which it is issued. Congress must, therefore, be taken to have adopted its interpretation, such that the Regulation has the force of law. *Hassett* v. *Welch,* No. 375, this Term (pamph. p. 7); *Old Mission Co.* v. *Helvering,* 293 U. S. 289, 294; *Hartley* v. *Commissioner,* 295 U. S. 216, 220.

Neither in his petition for certiorari nor in his brief on the merits does petitioner attack the validity of these regulations. This in itself might be sufficient to require affirmance of the decision of this question by the court below. See Stone and Cardozo, JJ. concurring in *Brush* v. *Commissioner,* 300 U. S. 352, 374; compare *Morehead* v. *New York ex rel. Tipaldo,* 298 U. S. 587, 604–605; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 389.

4. The Board of Tax Appeals has consistently ruled that mere promises to make gifts to charities are not deductible as claims against the estate.

[12] See Revenue Act of 1932, sec. 805, c. 209, 47 Stat. 169; Act of 1934, sec. 403 (a), c. 277, 48 Stat. 768; Act of 1935, Title II, c. 829, 49 Stat. 1014; Act of 1936, sec. 805, c. 690, 49 Stat. 1648.

Esther Porter v. *Commissioner*, 23 B. T. A. 1016, 1025, affirmed in part, 60 F. (2d) 673 (C. C. A. 2d), affirmed on another issue, 288 U. S. 436; *Turner* v. *Commissioner*, 31 B. T. A. 446, reversed, 85 F. (2d) 919 (C. C. A. 3d); *Safe Deposit & Trust Co.* v. *Commissioner*, 35 B. T. A. 259, 265, appeal pending (C. C. A. 4th); see *Romberger* v. *Commissioner*, 21 B. T. A. 193, 197. The Board has, on the other hand, with a like consistency ruled that pledges made in consideration of other subscriptions to the same institution are deductible claims.[13] Since the Commissioner did not seek review of that question, the merits of the decisions cited in the margin need not be considered in this case.

The question before this Court has been considered by four Circuit Courts of Appeals. With the exception of one in the Third Circuit each decision supports or is consistent with the Commissioner's interpretation of Section 303 (a) (1).

In *Esther Porter* v. *Commissioner*, 60 F. (2d) 673 (C. C. A. 2d), affirmed on another issue, 288 U. S. 436, the court denied a deduction claimed under Section 303 (a) (1) because the decedent had promised a hospital to pay the cost of an X-ray

[13] *Wade* v. *Commissioner*, 21 B. T. A. 339; *McIlhenny* v. *Commissioner*, 22 B. T. A. 1093, 1105; *Reed* v. *Commissioner*, 24 B. T. A. 166, 173; *Day* v. *Commissioner*, 34 B. T. A. 11, 23-24, affirmed, 91 F. (2d) 1009 (C. C. A. 3rd); *Hays* v. *Commissioner*, 34 B. T. A. 808, 813; *Maude L. Porter* v. *Commissioner*, 34 B. T. A. 798, 804, affirmed on another issue, 92 F. (2d) 426 (C. C. A. 2d).

room, which the executors paid after it had been built by the hospital."[14] The court said (pp. 675–676):

> That the testator's promise created a valid contract nobody denies; "promissory estoppel" is now a recognized species of consideration (Restatement of Contracts, § 90); indeed, the doctrine first gained currency in cases like those before us. But the section was certainly not intended to include all contracts supported by a consideration; so much is clear. We need not limit it to cases where the consideration passes to the testator; for example, a promise to pay for goods delivered to another might fall within it, if the testator has recourse over. But if he has not, the transaction is in substance a gift and must stand or fall with section 303 (a) (3). So here, though the testator was bound by his promise, what in fact he did was to give to the hospital a memorial to his son; it was not a financial bargain at all, and subdivision 1 is concerned with such. * * * The statute cannot have meant to make critical the accident that the hospital, by acting upon the promise, fastened a debt upon the estate. So to construe the language is to confuse the purposes of the two subdivisions.

In *Bretzfelder* v. *Commissioner*, 86 F. (2d) 713 (C. C. A. 2d), the court followed its decision in the

[14] The court also held that another gift to charity was deductible as a transfer under Section 303 (a) (3). This part of the decision is discussed below (pp. 31–32).

Esther Porter case and a similar decision was reached in *Lockwood* v. *McGowan,* 13 F. Supp. 966 (W. D., N. Y.), affirmed, 86 F. (2d) 1005 (C. C. A. 2d). So, too, in *Glaser* v. *Commissioner,* 69 F. (2d) 254 (C. C. A. 8th), the court denied a deduction based on a promise to a charitable institution which the executors had paid. The court without "disputing the strength of the moral appeal in the claim for deduction" (p. 255), held (p. 257)—

> that Section 303 (a) (1) does not justify making deduction from the gross estate in a case like the one presented here, where there was not a business transaction on the part of the decedent or a contract intended to augment his estate or to grant him some right or privilege he did not possess before or to discharge him from any existing obligation, but only a contemplated bounty was involved.

See, also, *Latty* v. *Commissioner,* 62 F. (2d) 952, 954 (C. C. A. 6th). And in *Carney* v. *Benz,* 90 F. (2d) 747, 749 (C. C. A. 1st), the court observed that the purpose of the section "was to prevent deductions, under the guise of claims, of what were in reality gifts or testamentary distributions."

On the other hand, the Circuit Court of Appeals for the Third Circuit indicated a contrary conclusion in *Turner* v. *Commissioner,* 85 F. (2d) 919.[15] The decision was placed either on the ground that a promise to give $1,000,000 to the Y. M. C. A. was

[15] The decision is criticized in Note, 50 Harv. Law Rev. 363.

a deductible claim under Section 303 (a) (1) or that it was a transfer under Section 303 (a) (3), and seems in large part to have been influenced by the erroneous assumption that this Court had passed on the question in *Porter* v. *Commissioner*, 288 U. S. 436. The court did, however, ask (p. 920) whether the consideration might not—

> be religious, charitable, or educational considerations which in some cases are not only "adequate and full," but are precious and priceless? We are told that "a good name is rather to be chosen than great riches." Consideration connected with educational, charitable, or religious gifts may not be money in a commercial sense, but it does constitute money's worth in a higher sense.

In two other cases the same court has allowed deductions under Section 303 (a) (1) where the pledges to charity by the decedent were conditioned upon subscriptions by others. *Commissioner* v. *Bryn Mawr Trust Co.*, 87 F. (2d) 607; *Commissioner* v. *Day*, 91 F. (2d) 1009. These decisions thus have no direct application to the question at bar, although it must be recognized that in the *Bryn Mawr* case the court stated (p. 609) that, apart from the promises by others, the consideration might be assumed to be the "expenditure by the college of funds" and that "it is clear that it was in money or money's worth since these expenditures were in money."

The cases in which the claim is founded on a business transaction may be put to one side. *United States* v. *Mitchell,* 74 F. (2d) 571, 575 (C. C. A. 7th): a guaranty of bank indebtedness contracted by a corporation in which members of decedent's family were interested; *Commissioner* v. *Strauss,* 77 F. (2d) 401, 405 (C. C. A. 7th): loans to decedent by his wife and son; *Commissioner* v. *Kelly's Estate,* 84 F. (2d) 958, 963–964 (C. C. A. 7th), certiorari denied, 299 U. S. 603: note given by decedent in payment of debts of deceased husband;[16] *Carney* v. *Benz,* 90 F. (2d) 747 (C. C. A. 1st): guaranty of broker's account of corporation owned by decedent's wife and daughter; *Commissioner* v. *Maude L. Porter,* 92 F. (2d) 426 (C. C. A. 2d): guaranty of bank loans to son-in-law. As was pointed out in both the *Benz* and the *Maude L. Porter cases,* claims based on these commercial transactions are in a quite different category from those based upon gifts.

5. It thus seems evident that the words of the statute, the legislative history of the provision, the regulations interpreting the section, and the preponderant authority in the lower courts, support the decision below (R. 76) that—

> measured by the precise tests of the statute, the promised donations here under consid-

[16] It may be noted, however, that the court in this case stated (p. 964) the rule too broadly: "The test of whether or not a claim is deductible is whether it is enforceable against decedent's estate."

> eration are but gifts, and there is no support for them as claims against the estate which may be deducted, of that full and adequate consideration in money or money's worth that is the unavoidable requirement of the statute.

This Court has recently had occasion to contrast a gift with a compensatory payment. *Bogardus* v. *Commissioner,* 302 U. S. 34. It is plain that each of the claims under consideration were based upon promises of gifts by the decedent. As such, they were not "incurred or contracted * * * for an adequate and full consideration in money or money's worth."

Against these considerations petitioner offers the argument (Br. 14) that the gifts to charity would be deducted from the gross estate under Section 303 (a) (3) if they had been made by will or by transfer in contemplation of death, and that Congress did not intend such a "ridiculous result" as to deny a deduction under Section 303 (a) (1) of claims based on promises to charities. As will be pointed out more fully below, taxpayer confuses the purposes of the two subdivisions here under examination, one of which (Sec. 303 (a) (1)) relates to claims founded upon adequate and full consideration in money or money's worth, which requirement patently excludes gifts, whether made to charities or not; while the other (Sec. 303 (a) (3)) relates only to transfers to certain charities

without regard to consideration. See *Esther Porter* v. *Commissioner, supra,* pp. 675–676. But a perhaps more basic answer is that it is the duty of the taxing authorities and the courts to apply the statutes as they are written, and not to shape the revenue acts into a symmetry which Congress has failed to give. As this Court, in *Crooks* v. *Harrelson,* 282 U. S. 55, 60, said with respect to a much more improbable result, the courts have no authority to disregard the words of a statute merely because they lead to "hard and objectionable or absurd consequences." Compare *Founders General Co.* v. *Hoey,* 300 U. S. 268, 275; *Dupont* v. *United States,* 300 U. S. 150.

We are not here contending (cf. Br. 15–16) that the consideration must necessarily pass to the donor; for example, a promise to pay for goods delivered or money loaned to another might fall within the statute if the decedent had recourse over against the one to whom they were delivered; but if the decedent could never receive "adequate and full consideration in money or money's worth" for his promise, the transaction is in substance a gift. Section 303 (a) (1) thus would have no application and any allowable deduction must be brought within the scope of Section 303 (a) (3).

Taxpayer also suggests (Br. 13, 16) that the test should be whether there is an intention to avoid the estate tax. While the amendments in 1924 and 1926 undoubtedly were intended to prevent or

reduce tax avoidance, petitioner must nonetheless bring the claim within the language of those amendments, and their wording clearly requires something more material and substantial than the moral satisfaction which the decedent undoubtedly obtained in making her benefactions. An absence of intention to avoid the tax is not enough; there must also be found that adequate and full consideration in money or money's worth which the statute requires. Any such consideration plainly is lacking here.

Petitioner argues (Br. 26–27) that there are special reasons why three of the claims should be allowed. These claims are based on the promises to pay $10,000 per annum toward the salary of a director of art, to pay $3,000 as the equivalent of the salary of a music professor, and to pay $3,920 for two years in order that two musicians might be retained by the Symphony Orchestra (*supra,* pp. 3–4). The argument seems to be that because the donee agreed to hire these men the decedent received "an adequate and full consideration in money or money's worth." But there is no reason to distinguish between charitable gifts according as they are directed to a broad or to a specific purpose. Because of the promises the institutions paid these men their salaries and received their services. But in the case of almost every gift the donor contemplates that the donee will use the gift. That the transaction in which

the gift is used embodies full consideration between the parties does not, of course, mean that this consideration may be transplanted to the transaction in which the gift was made.

II

THE ITEMS ARE NOT DEDUCTIBLE UNDER SECTION 303 (A) (3) AS TRANSFERS TO CHARITIES

Petitioner also urges (Br. 23–28) that the amount of these promises may be deducted from the gross estate under Section 303 (a) (3) as "transfers" to charitable institutions. The Government submits that deductions under that subdivision may be taken only with respect to gifts which are both completed transfers at the time of decedent's death and which are in effect testamentary dispositions, such as to be included in the gross estate under Section 302.

1. Section 303 (a) (3) *infra*, permits deduction from the gross estate of:

> The amount of all bequests, legacies, devises, or transfers * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes * * *. The amount of the deduction under this paragraph for any transfer shall not exceed the value of the transferred property required to be included in the gross estate; * * *

The ordinary meaning of the language of this provision carries two concepts, either of which is fatal to petitioner's claim for deduction.

In the first place, the subdivision is confined to testamentary dispositions. "Bequests, legatees, and devisees" cover gifts by way of will. The term "transfers" covers the only other method by which a charity can take property under testamentary disposition (in the sense of taxing statutes)—that is, by gifts made in contemplation of death.[17] In view of the part of the subdivision last quoted, "transfers" can have no other meaning. No "transferred property" but that made in contemplation of death could be included in the gross estate under Section 302 of the Act. Petitioner does not suggest that the promises made by decedent were made in contemplation of death. It follows, since the promises were not in the nature of a testamentary disposition, that they are not "transfers" as used in Section 303 (a) (3).

In the second place, the term "transfer" refers to a completed transaction, by which the title or possession to the property passes from transferor to transferee. It does not embrace a declaration of intention, or a binding promise, to make a trans-

[17] For purposes of simplicity of statement, we shall here use the term "in contemplation of death" also to include transfers intended to take effect in possession or enjoyment at or after death, and transfers subject to change or revocation by the decedent alone or in conjunction with any person. See Section 302 (c) and (d).

fer in the future. As the court below well said (R. 77):

> The most that can be said, we think, in the instant case is that the decedent had contemplated a transfer and had promised to make one. * * *

Neither in the ordinary sense nor in any technical legal use of the term does "transfer" relate to any agreement or transaction other than that by which the property actually passes from one person to another. The lexicographers without exception seem to consider the term as inapplicable to any act which does not serve to complete passage of the title or right.[18] The courts, apparently without exception except that based upon markedly different contexual requirements, have held that agreements to make future transfers, or acts which do not completely pass title or possession to the property are

[18] Bouvier, Law Dictionary (3rd ed.) defines transfer as "the act by which the owner of a thing delivers it to another person, with the intent of passing the rights which he has in it to the latter." Webster's New International Dictionary (2d ed.) defines the term as the act of transferring; the verb is defined: "to convey from one place, person, or thing to another; to transport, remove, or cause to pass to another place, person, or thing; * * * To make over the possession or control of; to make transfer of; to pass; to convey, as a right, from one person or another * * *." The other definitions are substantially identical to that of Webster. See Funk & Wagnalls New Standard Dictionary; Century Dictionary & Cyclopedia; Black, Law Dictionary (2d Ed.).

not "transfers" within the meaning of statutes and contracts.[19]

Petitioner suggests (Br. 24) that in many cases the estate tax statute speaks of "transfer" in the sense of a contract to complete the "actual transfer" at a later date. We do not so read the statute. Certainly, the only example which he gives—the creation of a trust reserving a life estate for himself and his wife with the remainder to charity—does not support him. In such a case the charity has a vested remainder, and title passes to it on creation of the trust. See *Coolidge* v. *Long*, 282 U. S. 582, 597; *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39.

Petitioner does not, and cannot, argue that the promises of the decedent operated of themselves to pass or deliver the money she intended in the future to give to charity. It results that these promises were not "transfers" within the plain meaning of Section 303 (a) (3).

2. If there be doubt as to whether the term "transfers" includes either non-testamentary dis-

[19] See, e. g., *Ware* v. *Quigley*, 176 Cal. 694, 697–698; *Robertson* v. *Wilcox*, 36 Conn. 426, 429–431; *Aurora Fire Ins. Co.* v. *Eddy*, 55 Ill. 213, 220; *Talty* v. *Schoenholz*, 323 Ill. 232; *Estate of Soden*, 105 N. J. Eq. 595; *Van Deusen* v. *The Charter Oak Ins. Co.*, 1 Abb. Pract. (N. S.) 349, 358; *Noble* v. *Ft. Smith Wholesale Grocery Co.*, 34 Okla. 662, 670; *Hill* v. *Cumberland Valley Co.*, 59 Pa. 474, 477; *Hammell* v. *Queens Ins. Co.*, 54 Wis. 72, 85; compare *McVeigh* v. *Chicago Mill & Lumber Co.*, 96 Ark. 480, 491.

positions or mere contracts to make payments in the future, it would be resolved by consideration of the legislative history of Section 303 (a) (3).

The charitable exemption was introduced in Section 403 (a) (3) of the Revenue Act of 1918, which provided simply for the deduction of "bequests, legacies, devises, or *gifts*" to charities. In an obvious effort to bring the italicized category into harmony with the contemplation of death section,[20] this was changed in the 1921 Act to permit the deduction of:

> * * * bequests, legacies, devises, or transfers, except bona fide sales for a fair consideration in money or money's worth, in contemplation of or intended to take effect in possession or enjoyment at or after the decedent's death, * * *.

In the 1926 Act Section 303 (a) (3) retains the same correlation with the contemplation of death section, but accomplishes this in a different manner,[21] by providing that:

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[20] The 1921 amendment was introduced by the Senate committee. S. Rpt. No. 275, 67th Cong., 1st Sess., p. 25, states the purpose of the amendment as follows:

> Section 403 (a) (3) * * * makes it clear that gifts by decedent during his lifetime for public, religious, charitable, scientific, literary, educational, or other benevolent purposes are not deductible where the value of the property given is not required under the law to be included in his gross estate.

[21] While there is no explanation of this change, made in conference, it is probable that it was desired to express the correlation less awkwardly. Especially would this be the

> The amount of the deduction under this paragraph for any transfer shall not exceed the value of the transferred property required to be included in the gross estate; * * *

Thus, it is apparent that, at least ever since the 1921 Act, the term "transfers" as used in Section 303 (a) (3) refers only to those which are embraced within the contemplation of death provision, Section 302 (c) and (d), and which are accordingly included in the gross estate. No transfer would be brought under the contemplation of death section unless it were completed prior to death, and unless it was testamentary in character. Since neither is the case with respect to the promises at issue here, they cannot be transfers to charities within the meaning of Section 303 (a) (3).

3. As has been shown, the charitable deduction section has remained unchanged in operation at least since 1921, although its language was revised

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case had the draftsmen made belated recognition that the 1924 Act introduced a third type of transfer during life, that subject to modification or revocation by the grantor, which was included in the gross estate.

This purpose, more simply to express the content of the old section, is further indicated by the elimination of the proviso, found in the 1921 and 1924 Acts, that the charitable transfers which were deductible were not to be "bona fide sales for a fair consideration in money or money's worth." This proviso had no purpose whatever except to provide a precise correlation with the contemplation of death section. The revised wording in the 1926 Act accomplished this correlation automatically, and the unnecessary proviso accordingly was eliminated.

to accomplish the same result in the 1926 Act. During this seventeen year period the Regulations have consistently denied deduction of promises such as those of the decedent.

Article 47 of Regulations 63 (under the 1921 Act) permitted deduction of property transferred to charity "by the decedent in his lifetime in contemplation of or intended to take effect in possession or enjoyment at or after death." Congress, in the 1924 Act, reenacted the section without change. Article 44 of Regulations 68, under that Act, was identical with the previous Article 47. In Article 44 of Regulations 70 (1926 Ed.) the language of the regulation was changed to conform to the revised wording of the 1926 Act, and permitted deduction of property transferred "by the decedent in his lifetime not to exceed the value of the transferred property required to be included in the gross estate." This, as we have shown in connection with the history of the statutory provision, did not change the operation of the earlier language. The subsequent regulations have left this language unchanged. Articles 44 of Regulations 70 (1929 Ed.), and Regulations 80 (1934 and 1937 Ed.).

It thus will be noted that from 1921 to 1926 the Regulations expressly required that deductible transfers could be only those made in contemplation of death, and that from 1921 until the present time the regulations have consistently required

that the deductible transfer be one made "by the decedent in his lifetime." During this period the estate tax statute has twice been reenacted and has five times been amended; the very section in question has three times been amended.[22] The regulations, therefore, must be taken to have received the approval of Congress such that they now have the force of law (*supra,* p. 15). Moreover, petitioner has not attacked their validity, either in his petition or in his brief on the merits, and the decision of the court below on this question might be affirmed on that ground alone (*supra,* p. 15.)

4. The precise question at bar has been considered in four Circuit Courts of Appeals; in the Second and Third Circuits it has been held that promises to make gifts are "transfers" within the meaning of Section 303 (a) (3); in the Sixth and the Eighth Circuits it has been held to the contrary. A related decision in the Tenth Circuit supports the Government.

The course of decisions in the Second and Third Circuits presents an interesting study. In *Esther Porter* v. *Commissioner,* 60 F. (2d) 673, 675 (C. C. A. 2d) the court held amounts paid by an executor pursuant to a promise by the decedent to be deductible under Section 303 (a) (3) because the court would take judicial notice of the fact that Princeton University was an educational corpora-

[22] See, in addition to the citations in footnote 12, *supra,* Revenue Act of 1928, sec. 401, c. 852, 45 Stat. 791.

tion. There was no discussion of what constitutes a "transfer." This Court, *on petition by the taxpayer,* affirmed the decision below on a wholly different question, 288 U. S. 436. Yet in *Turner* v. *Commissioner,* 85 F. (2d) 919 (C. C. A. 3rd), the court, dealing with a similar promise by the decedent, held it to be a "transfer" because "the decision of the Supreme Court * * * affirming the judgment in that (the *Porter*) case is binding on us" (pp. 919–920; see also p. 920). The court offered no other reason for its decision on this question, except to suggest in passing that the promise "may be regarded as a constructive transfer" (p. 920). In the meantime the court in *Lockwood* v. *McGowan,* 13 F. Supp. 966 (W. D. N. Y.) followed the *Porter* case because "this court feels it is bound by the decision" (p. 967); no independent reason was offered. This decision was affirmed per curiam on the authority of the *Porter* case, 86 F. (2d) 1005 (C. C. A. 2d). In *Commissioner* v. *Bryn Mawr Trust Co.,* 87 F. (2d) 607 (C. C. A. 3rd) the court sustained the deduction under Section 303 (a) (1), but referred approvingly to the *Porter* and *Turner* cases and repeated the earlier error that the *Porter* decision had been affirmed by this Court. Not one of the opinions in these cases offer any reason why the amount of the promises should be deducted under Section 303 (a) (3), and those in the Third Circuit have the further vice of a flagrantly erroneous notion as to the scope of appellate review.

In contrast, the decision of the court below represents a carefully considered examination of the purpose and scope of Section 303 (a) (3). It said (R. 76–77):

> Notwithstanding the cited decisions, it is difficult to understand how a pledge, unexecuted during the life of the promissor, however binding under local law, may constitute a transfer. * * * The most that can be said, we think, in the instant case is that the decedent had contemplated a transfer and had promised to make one. We are unable to conclude that the transfer, if ever it is made, will relate back to the promise to make it, especially as there was by the decedent no allocation of funds or securities to the carrying out of the pledge.

In *Glaser* v. *Commissioner,* 69 F. (2d) 254, certiorari denied, 292 U. S. 654, petition for rehearing denied, 293 U. S. 628, the court noted that in the *Porter* case the question seemed to have been decided without consideration and stated (p. 257):

> The promises made by Mr. Sommers in this case cannot by any reasonable persuasion be brought within the meaning of "bequests, legacies, devises, or transfers" covered by this section of the statute * * *.

Finally, it may be noted that in *United States* v. *Fourth National Bank,* 83 F. (2d) 85, 90, 92 (C. C. A. 10th), certiorari denied, 299 U. S. 575, the court held that, where the decedent in his life

"gave" $100,000 to charity by delivery to an escrow agent, but subject to the condition that an equal amount be raised from others, there was no transfer permitting deduction under Section 303 (a) (3) even after the condition had been met and the executor had paid.

5. The words of the statute, its history and the best considered decisions in the lower courts support the conclusion that the "transfers" which may be deducted under Section 303 (a) (3) are not mere promises to transfer but only those which have been completed by the decedent and which are included in the gross estate by the provisions of Section 302 (c) and (d). Clearly there had been no completed transfer by the decedent of any of the items involved in this case. Cf. *Burnet* v. *Guggenheim,* 288 U. S. 280; *Chase Nat. Bank* v. *United States,* 278 U. S. 327, 334; *Hesslein* v. *Hoey,* 91 F. (2d) 954 (C. C. A. 2d), certiorari denied, December 6, 1937.

It must be borne in mind that the two subdivisions, Section 303 (a) (1) and (3), are separate and distinct. See *Porter* v. *Commissioner,* 60 F. (2d) 673, 675–676 (C. C. A. 2d). Since Congress has described in Section 303 (a) (1) the claims and indebtedness which may be deducted from the gross estate, and likewise has clearly indicated certain claims which may not be deducted, it follows that the provisions of Section 303 (a) (3) should not be construed to include, under the term "trans-

fers," deductions for amounts which are plainly not transfers but are claims and are excluded from deduction as claims. Had Congress desired to permit deductions of claims for the benefit of institutions of the type specified in the statute, it could easily have done so by including them in Section 303 (a) (3), or by excepting claims based on promises to charities from the limitations of Section 303 (a) (1). It has done neither.

Taxpayer's argument (Br. 14) that Congress must have intended to allow deductions such as here claimed seems in last analysis to be based upon the proposition that subdivisions 303 (a) (1) and 303 (a) (3) must be read in conjunction. But, we submit, they are entirely separate and distinct; they came into the estate tax statute at different times and their development has proceeded along different lines; the subdivision relating to claims requires consideration of a character here lacking; subdivision (3) requires a bequest, legacy, devise or transfer, none of which is found here. What Congress clearly intended by subdivision (3) was to allow deductions for transfers to charities, such as those in contemplation of death, which were included as a part of the gross estate, and which were completed in the decedent's lifetime.

Neither the Board of Tax Appeals nor the court below was unmindful of the "recognized policy of the Congress to encourage and to relieve from onerous tax exactions gifts to charitable, religious, and

educational institutions." (R. 24, 26, 76.) See *Old Colony Co.* v. *Commissioner,* 301 U. S. 379, 383; *Edwards* v. *Slocum,* 264 U. S. 61, 63. But they were also aware of the necessity for measuring the scope of the deduction privilege by the "precise tests of the statute" (*New Colonial Co.* v. *Helvering,* 292 U. S. 435, 440). It seems clear, for the reasons we have advanced above, that there were in the instant case no "transfers" such as are required under Section 303 (a) (3) to form the basis for deductions.

Indeed, so far as appears from the record (R. 25, 77), the $2,000,000 item never has been paid over to the University of Cincinnati. It would, we submit, be most anomalous to permit a deduction, as property transferred by the decedent, of a promise which had not yet been performed some four years after her death.

The case of *Smith* v. *Commissioner,* 78 F. (2d) 897 (C. C. A. 1st), referred to by taxpayer (Br. 27) is inapplicable, irrespective of its correctness. There the decision was placed on the ground that state law should govern; under the state law the effect of the compromise of the will contest was to embody the award or compromise in the will. Hence deductions were allowed for amounts paid to charities on the theory that they were legatees. No question such as presented in the instant case, as to whether there was a statutory "transfer", was raised or considered in the *Smith* case.

On pages 24–27 of his brief, the executor urges that the making of the contracts to pay money to the institutions constituted transfers to them; in support of that contention the executor relies upon the decision of this Court in *Chase Nat. Bank* v. *United States, supra.* That case held that a transfer tax might be imposed in respect of proceeds of life insurance policies where the decedent had retained substantial rights which were terminated by his death. It is believed that the *Chase Nat. Bank* case not only does not support the position of the taxpayer but that it strengthens the position of the Commissioner. It supports the propositions that within the meaning of the estate and gift tax laws, the word "transfer" refers to a "completed transfer" and that there is no completed transfer where the transferor has retained substantial control over, or rights with respect to, the property in question. And if that be so, there certainly could have been no transfers in the instant case when the decedent made her promises.

The executor also urges (Br. 27–28) that performance by the executor constitutes a transfer within the meaning of the subdivision. As we have noted, so far as the record shows, the executor never has paid over the $2,000,000 item to the University of Cincinnati. But even if the executor had completed the transfer, the result would not be altered. However laudable the motives of the decedent may have been, her executor must bring his

case within the scope of the statute and he has not done so either by showing promises of the decedent or, with respect to some of the items, performance by her executor. Under subdivision 303 (a) (3) the executor, to justify the deductions claimed, must show transfers completed in the decedent's lifetime, and of a character such as to be included in the gross estate under Section 302. This he failed to do.

CONCLUSION

For the reasons which we have set out, it is respectfully submitted that the judgment of the court below should be affirmed.

ROBERT H. JACKSON,
Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
L. W. POST,
Special Assistants to the Attorney General.
WARNER W. GARDNER,
Special Attorney.

APRIL 1938.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his

death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of any interest therein, of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act, without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title (U. S. C., Title 26, Sec. 411).

* * * * * *

SEC. 303. For the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages upon, or any indebtedness in respect to, property (except,

in the case of a resident decedent, where such property is not situated in the United States), to the extent that such claims, mortgages, or indebtedness were incurred or contracted bone fide and for an adequate and full consideration in money or money's worth, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy, or inheritance taxes;

* * * * *

(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable,

scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. The amount of the deduction under this paragraph for any transfer shall not exceed the value of the transferred property required to be included in the gross estate (U. S. C., Title 26, Sec. 412).

Treasury Regulations 80 (1934 ed.):

ART. 29. *Deduction of administration expenses, claims, etc.*—In order to be deductible under the foregoing provision of the statute, the item must fall within one of the several classes of deductions specifically enumerated therein, and must also, except in the case of deductible losses during the administration of the estate, be one the payment of which out of the estate is authorized by the laws of the jurisdiction under which the estate is being administered. Unless both of these conditions exist the item is not deductible. If the item is not one of those described it is not deductible merely because payment is allowed by the local law. If the amount which may be expended for the particular purpose is limited by the local law no deduction in excess of such limitation is permissible. If a claim against the estate, an unpaid mortgage, or an indebtedness is founded upon a promise or agreement, the deduction therefor is limited to the extent that the liability was contracted bona fide and for an adequate and full consideration in money or money's worth. A relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, is not to any extent a consideration in money or money's worth.

* * * * *

ART. 36. *Claims against the estate.*—The amounts that may be deducted under this heading are such only as represent personal obligations of the decedent existing at the time of his death, whether then matured or not, and any interest thereon which had accrued at time of death. Only claims enforceable against the estate may be deducted. If the claim is founded upon a promise or agreement the deduction therefor is limited to the extent that the liability was contracted bona fide and for an adequate and full consideration in money or money's worth. A pledge or a subscription, evidenced by a promissory note or otherwise, even though enforceable against the estate, is deductible only to the extent such pledge or subscription was made bona fide and for an adequate and full consideration in cash or its equivalent. See article 29 as to relinquishment or promised relinquishment of dower and similar interests. Liabilities imposed by law or arising out of torts are deductible.

ART. 44. *Transfers for public, charitable, religious, etc., uses.*—Deduction may be taken of the value of all property transferred by will or by the decedent in his lifetime not to exceed the value of the transferred property required to be included in the gross estate if in either case the property was transferred * * * (2) to or for the use of any corporation or association organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes (including the encouragement of art and the prevention of cruelty to children or animals), if no part of the net earnings of the corporation or association inures to the benefit of any private stock-

holder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation; or (3) to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, if such transfers, legacies, bequests, or devises are to be used by such trustee, trustees, fraternal society, order, or association exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only in so far as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay or deliver the principal to a charitable corporation, or to apply it to a charitable purpose, the present value of the remainder is deductible. To determine the present value of such remainder use the appropriate factor in column 3 of Table A or B of article 13.

The deduction is not limited, in the estates of residents (or of citizens who died after the enactment of the Revenue Act of 1934), to transfers to domestic corporations or associations, or to trustees for use within the United States.

* * * * *

The corresponding provisions of Articles 29, 36, and 44 of Regulations 80 (1937 edition) are substantially the same as the foregoing.

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SUPREME COURT OF THE UNITED STATES.

No. 746.—October Term, 1937.

Robert A. Taft, Executor of the Estate of Anna S. Taft, Deceased, Petitioner,
vs.
Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[May 16, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

The question presented is whether the petitioner, as executor, may deduct from the gross estate amounts payable pursuant to the decedent's binding promises as claims against the estate incurred bona fide and for an adequate and full consideration in money or money's worth within the meaning of Section 303(a)(1), or as transfers to charitable or educational institutions under Section 303(a)(3) of the Revenue Act of 1926.[1] The deductions were of amounts owing at the decedent's death upon the following contractual obligations.

By letter the decedent agreed with the University of Cincinnati to establish a fund as a memorial to her husband, stating that she would make available to the trustees of the fund, whom she named, during the ensuing year, $50,000, during the following year $75,000,

[1] "Sec. 303. For the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate—

"(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages upon, or any indebtedness in respect to, property . . . to the extent that such claims, mortgages, or indebtedness were incurred or contracted bona fide and for an adequate and full consideration in money or money's worth, . . .

" . . .

"(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, . . ."

and, in each succeeding year, $100,000 or such other income as might be derived from a fund of $2,000,000 which she would ultimately transfer to the trustees. The letter outlined the terms of the trust to which the income was to be devoted. The offer was formally accepted by the Board of Directors of the University and, pursuant to the agreement, the decedent made payments to the trustees and her executor continued to pay sums on account of interest and principal. The University is an educational institution and no profit enures to anyone from its operation.

Being deeply interested in the Cincinnati Institute of Fine Arts and its work, and having jointly with her husband and as an individual contributed large sums to this work, the decedent, to obviate the necessity of reducing the personnel of the orchestra the Institute conducts, agreed with the Institute that if it would retain two musicians she would pay their salaries under contracts covering two years. In reliance upon her promise the Institute re-engaged the two men. The decedent paid the amount of their salaries prior to her death and petitioner, as executor, paid them to the end of the contract term. The Institute would not have re-employed these men except for the agreement. It is a charitable corporation organized for the maintenance of a symphony orchestra and other activities, and no profit enures to anyone from its operations.

The decedent agreed by letter addressed to the Cincinnati Institute of Fine Arts that if it would employ a director of art she would contribute $10,000 towards his salary. In reliance upon this undertaking the institution engaged such a director at a salary of $10,000 per annum. She paid the stipulated amount for one and one-half years prior to her death and the petitioner, as executor, paid for one year subsequent to her death. There were no available funds for the employment of a director except those received from the decedent and the Institute would not have employed one except for her agreement. It is an educational institution and does not operate for profit.

In 1930 the decedent agreed with the University of Cincinnati that if it would engage a named person as professor to give a specified course of instruction she would pay the University the amount of his salary. She had made similar arrangements for prior years. The University employed the professor and would not have done so except for her agreement. At the time of her

death a sum remained due according to her promise which the petitioner paid.

The total claimed as deductible on account of these obligations was $2,015,420. Under the law of Ohio, the decedent's promises were and are legally binding and enforceable against her estate. The Commissioner ruled, and the Board[2] and the court below[3] have held that the estate's obligations in question, though contracted bona fide, were not incurred for an adequate and full consideration in money or money's worth as required by clause (1) and payments of the sums promised are not transfers to or for the use of any corporation organized and operating exclusively for charitable or educational purposes within the meaning of clause (3) of Sec. 303(a) of the Act. We granted certiorari because of an alleged conflict of decision.[4]

1. The claims against the estate were not incurred or contracted for an adequate and full consideration in money or money's worth within the meaning of the statute. The terms used, the legislative history of the section, and the regulations interpreting it, require this conclusion. The conditions imposed by the decedent as to the expenditure of the money promised and the stipulation on the part of the payee to expend it in that fashion, or its compliance with the conditions, do not constitute an adequate or a full consideration in money or money's worth within the meaning of the Act. If there were doubt about the matter the legislative history of the statute and the Treasury regulations would require us so to hold. The Revenue Act of 1916 permitted the deduction of the amount of claims against the estate "allowed by the laws of the jurisdiction . . . under which the estate is being administered."[5] The Acts of 1918 and 1921 contain like provisions.[6] Under these Acts the claims in question would have been deductible as enforceable by state law irrespective of the nature of the consideration.[7] The

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[2] 33 B. T. A. 671.

[3] 92 F. (2d) 667.

[4] See Turner *v.* Commissioner, 85 F. (2d) 919; Commissioner *v.* Bryn Mawr Trust Co., 87 F. (2d) 607; Porter *v.* Commissioner, 60 F. (2d) 673; Bretzfelder *v.* Commissioner, 86 F. (2d) 713; Lockwood *v.* McGowan, 86 F. (2d) 1005.

[5] Revenue Act of 1916, Sec. 203 (a) (1), 39 Stat. 756, 778.

[6] Revenue Act of 1918, Sec. 403 (a) (1), 40 Stat. 1057, 1098; Revenue Act of 1921, Sec. 403 (a) (1), 42 Stat. 227, 279.

[7] Atkins *v.* Commissioner, 30 F. (2d) 761.

Act of 1924 altered existing law and authorized the deduction of claims against an estate only to the extent that they were "incurred or contracted bona fide and for a fair consideration in money or money's worth."[8] Congress had reason to think that the phrase "fair consideration" would be held to comprehend an instance of a promise which was honest, reasonable, and free from suspicion whether or not the consideration for it was, strictly speaking, adequate.[9] The words "adequate and full consideration" were substituted by Sec. 303(a)(1) of the Act of 1926. There must have been some reason for these successive changes. It seems evident that the purpose was to narrow the class of deductible claims, and we are not at liberty to ignore this purpose.

The regulations of the Treasury promulgated under the Act of 1924 and the first edition applicable to that of 1926, paraphrased the statutory language.[10] The 1929 edition of Regulation 70, Art. 36, provides in part: "A pledge or a subscription evidenced by a promissory note or otherwise, even though enforceable against the estate, is deductible only to the extent such pledge or subscription was made for an adequate and full consideration in cash or its equivalent received therefor by the decedent."[11] Since 1929 the regulations have excluded deductions such as those in issue here. Meantime the estate tax provisions have been amended four times and the section under which the regulations were promulgated has been amended twice. We must assume that Congress was familiar with the construction put upon the section by the Treasury and was satisfied with it. The Board of Tax Appeals[12] and the courts,[13] with the exception of the Circuit Court of Appeals for the Third Circuit,[14] have held that a promise to pay money to a charitable

[8] Revenue Act of 1924, Sec. 303 (a) (1), 43 Stat. 253, 305.

[9] See Ferguson *v.* Dickson, 300 Fed. 961, 964.

[10] Regulations 68, Arts. 29, 36; Regulations 70 (1926 Ed.) Arts. 29, 36.

[11] See also Regulations 80, 1934 Ed., Art. 36; Regulations 80, 1937 Ed., Art. 36.

[12] Porter *v.* Commissioner, 23 B. T. A. 1016, 1025; Turner *v.* Commissioner, 31 B. T. A. 446; Safe Deposit & Trust Co. *v.* Commissioner, 35 B. T. A. 259, 265.

[13] Porter *v.* Commissioner, 60 F. (2d) 673; Bretzfelder *v.* Commissioner, 86 F. (2d) 713; Glaser *v.* Commissioner, 69 F. (2d) 254; Carney *v.* Benz, 90 F. (2d) 747, 749; Lockwood *v.* McGowan, 13 F. Supp. 966, affirmed 86 F. (2d) 1005.

[14] Turner *v.* Commissioner, 85 F. (2d) 919; Commissioner *v.* Bryn Mawr Trust Co., 87 F. (2d) 607, 609.

or educational institution, where the only consideration was a stipulated application of the amount received, does not constitute a claim against the estate contracted for an adequate and full consideration in money or money's worth notwithstanding the fact that under local law the promise is enforceable. In this view we agree.

2. Payments pursuant to the promises are not transfers within the meaning of Section 303(a)(3). The court below excluded the payments from the operation of that section upon two grounds. Both, as we think, are valid. The petitioner's payment, after the decedent's death, of a sum promised during her life, is not appropriately designated a transfer. True the decedent has promised to make a transfer but fulfillment of the promise by the executor does not relate back to the time the promise was made so as to convert her promise into a transfer by her. Here the subject of the transfer was not identified by any allocation of decedent's funds during her life. This fact adds point to the view that she made no transfer.

Subsection (3) applies only to testamentary dispositions. The phrase is "the amount of all bequests, legacies, devises, or transfers" to certain specified religious, charitable, scientific, literary or educational uses. The right to the deduction is qualified by the provision "The amount of the deduction under this paragraph for any transfer shall not exceed the value of the transferred property required to be included in the gross estate." The only transfers required to be included in the gross estate are those made in contemplation of death or to take effect in possession or enjoyment at or after death.[15] In other words, only such transfers as are testamentary in character are to be included in the gross estate, and it follows that only those of that character are deductible under subsection (3). Those here in question were clearly not such. There is no claim that the agreements were made in contemplation of death or to take effect in possession or enjoyment at or after death.

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[15] See Sec. 302 (c), 44 Stat. 70. "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, . . . (c) To the extent of any interest therein of which the decedent has at any time made a transfer, . . . in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth". . . . See also subsection (d), 44 Stat. 71.

3. The petitioner urges that all of the revenue acts have granted liberal deductions in respect of income tax and estate tax for contributions to charitable and educational purposes. He says that if the benefactions in question had been made in the form of bequests or gifts to take effect at death there would be no question of the right to the claimed deductions. He urges, therefore, that we should adopt a liberal construction of the Act to effectuate the intent of Congress even though the payments in question do not fall within the strict meaning of the words used. But we are not permitted to speculate as to the reasons why the policy evidenced with respect to other forms of gift was not extended to claims upon promises enforceable by state law. We are bound to observe the alterations made in the successive acts which, in the plain meaning of the language employed, exclude deduction of enforceable claims of the sort here involved, even though the case be a hard one. The testatrix was bound to bring her transactions within the letter of the statutory provisions and the regulations at the risk that noncompliance might deprive her estate of tax immunity as respects the pledges.

The judgment is

Affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.